SUPREME COURT, U. S.

JUN 14 1968

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NO. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CARSON PIRIE SCOTT & COMPANY,
KROCH'S & BRENTANO'S, INC.,
THE FAIR, and RAY BRENNAN,
Petitioners,

v.

JOHN FACTOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD P. ROBINSON
GEORGE W. MCBURNEY
ARTHUR F. STAUBITZ
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioner,
Carson Pirie Scott & Company

Of Counsel:
SIDLEY & AUSTIN

JACK EDWARD DWORK
69 West Washington Street
Chicago, Illinois 60602
Attorney for Petitioner,
Kroch's & Brentano's, Inc.

NARCISSE A. BROWN
WILLIAM F. MCNALLY
140 South State Street
Chicago, Illinois 60603
Attorneys for Petitioner,
The Fair

MRS. ELOISE JOHNSTONE
33 North Dearborn Street
Chicago, Illinois 60602
Attorney for Petitioner,
Ray Brennan

June 14, 1968.

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Carson Pirie Scott & Company, Kroch's & Brentano's, Inc., The Fair and Ray Brennan pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 13, 1968.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment Order of the District Court, which were not officially reported, are set forth in Appendix A hereto. The majority and dissenting opinions in the Court of Appeals have not yet been officially reported and are set forth in Appendix B hereto. The Findings of Fact, Conclusions of Law and Judgment Order of the District Court in the companion case of *Factor* v. *Pennington Press, Inc.*, are officially reported

at 238 F. Supp. 630 (N. D. Ill. 1964) and are set forth in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 13, 1968. The petition of Petitioners for rehearing *en banc* was denied on May 10, 1968, by the Court of Appeals for the Seventh Circuit, *en banc*.[1] The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in disposing of "the fundamental question" of plaintiff's belief concerning the location of his place of birth, the majority below violated Federal Rule of Civil Procedure 52(a) and arbitrarily departed from the accepted and usual course of appellate procedure by:

   (a) Rejecting the District Court's finding that plaintiff was a "wholly untrustworthy witness * * * not acting in good faith;" and

   (b) Substituting its own factual findings for the directly opposite findings of fact which were made by the District Court upon the basis of extensively contested testimony and documentary evidence.

2. Whether, after holding that the District Court erred in allocating the burden of proof or applying a presumption concerning the "good faith" of plaintiff's belief concerning the location of his birthplace, the majority below erred in proceeding to make its own findings concerning the weight

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1. Senior Circuit Judge Knoch voted to grant the petition for rehearing *en banc*. Circuit Judge Cummings did not vote.

and credibility of evidence rather than remanding the case to the District Court with appropriate instructions.

3. Whether, in reviewing the saving provision of the Illinois Limitations Act (Ill. Rev. Stat., 1965, Chap. 83, Sec. 24a) the Court of Appeals violated the principle of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), by rejecting the only relevant Illinois decisions and the interpretation of similar statutes in other states and in this Court.

STATUTES INVOLVED

The statutory provisions involved are Rule 52(a) of the Federal Rules of Civil Procedure, Title 28 U.S.C. and Sections 14 (which *bars* plaintiff's action) and 24a (the "Saving Statute") of Chapter 83 of the Illinois Revised Statutes (1965). These statutes are set forth in Appendix D hereto.

STATEMENT OF THE CASE

This action was brought by plaintiff John Factor to recover damages for allegedly libelous statements contained in the book, *The Stolen Years*, written by Roger Touhy and Petitioner Ray Brennan.[2] As the present complaint correctly alleges, this action is virtually identical to an action, known as *Factor* v. *Pennington Press, Inc.*, 59 C 1961 (N.D. Ill.) ("1959 Case"), brought by Factor "against these same defendants [including Petitioners herein] on the same claims for relief" (R. 3).[3] In the 1959 Case, the sole basis

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2. Carson Pirie Scott & Company, Kroch's & Brentano's, Inc. and The Fair were defendants, and are Petitioners, herein solely because they allegedly sold copies of *The Stolen Years*.

3. All references to the Appellant's Appendix, which has been filed by Petitioners as a part of the record in this case pursuant to Rule 21 of this Court, will be indicated as "R." followed by the appropriate page number.

of Federal jurisdiction alleged was that Factor was a citizen of the United Kingdom (A-2; R. 3, 17)[4] by reason of having been born in Hull, England, the defendants being citizens of the United States.

The 1959 Case was dismissed, with prejudice, in December, 1964, on the ground, among others, that Federal diversity jurisdiction did not exist "because Factor was a stateless person at the time of filing the 1959 Case and had been born in Russia, not England as he claimed" (A-5). See *Factor* v. *Pennington Press, Inc.*, 238 F. Supp. 630, 634 (N.D. Ill. 1964) (C-8). Plaintiff's appeal in the 1959 Case was aborted on his own motion. (See Order, *Factor* v. *Pennington Press, Inc.*, No. 15049, 7th Cir. (May 20, 1965)).

In September, 1965, Factor filed his present complaint in the same Federal District Court in which he had filed the 1959 Case (R. 21), and alleged diversity of citizenship as a "citizen and resident of the State of California" by reason of his naturalization as a United States citizen in 1963 (R. 2). Petitioners moved to dismiss the present case on the ground, among others, that it was then (and is now) barred, as an Illinois cause of action, by the one-year Illinois Statute of Limitations (Ill. Rev. Stat., 1965, Chap. 83, Sec. 14) (R. 21). It is not disputed that the present suit is barred by the Illinois Statute of Limitations unless the Saving Statute (Ill. Rev. Stat., 1965, Chap. 83, Sec. 24a) is applicable and available to plaintiff.

In February, 1966, the District Court dismissed this case on the grounds that it was barred by Section 14 of the Illinois Statute of Limitations and that Factor could "derive no benefit from §24a," the Illinois Saving Statute,

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4. All references to the Appendices hereto will be indicated by the letter of the appropriate Appendix followed by the appropriate page number.

because "a 'good faith' requirement is implicit in §24a" and because Factor's prior false "assertion of federal jurisdiction *cannot be laid to error or inadvertence, and was clearly not in good faith*" (R. 13).[5]

However, in March, 1966, on motion by Factor, the District Court vacated that dismissal and subsequently held a hearing on the "limited issue" of Factor's good faith in filing the 1959 Case (R. 15-16). In October, 1966, the District Court again dismissed the present action with prejudice (A-13). The basis of this second dismissal was that "a 'good faith' requirement is implicit in Section 24(a);" that Factor "was not in good faith in claiming in the 1959 Case that he was born in Hull, England, and he did not act in good faith in pursuing that claim *when he knew it to be false;*" and that Factor's action was, therefore, barred by the Statute of Limitations (A-12—A-13). Furthermore, the District Court reaffirmed its conclusion that "Factor was a wholly untrustworthy witness and that the frequent and repeated impeachment of his claim that he was born in Hull, England, makes it impossible to believe either his claim in Court that he was born" there or his documentary statements to the same effect (A-6, A-10).

The Court of Appeals, with Judge Knoch dissenting, reversed that conclusion. Although certain aspects of the opinion of the court below are unclear, the majority unequivocally declared that "The fundamental question now is whether there was in the evidence in the record before the district court a sufficient basis for a reasonable belief by plaintiff that he was born in Hull, England" (B-15). After discussing some of the evidence—in the terms stated in the brief for plaintiff—the majority explicitly reached a "factual result" (B-18) different from that of the District Court and rejected the District Court's finding that plain-

5. Emphasis herein is added unless indicated otherwise.

tiff did not honestly believe in 1959 that he was born in Hull, England (B-18—B-19). The majority also concluded that the District Court incorrectly "imposed upon" plaintiff "the burden of *disproving*" his bad faith in filing the 1959 Case (B-4; emphasis by the court) or incorrectly raised "a presumption of bad faith" (B-13). In addition, the majority concluded that the Illinois Saving Statute has not been or should not be interpreted to include a "good faith" requirement where the plaintiff is guilty of making a knowingly false jurisdictional allegation, as distinguished from "self-initiated delay" (B-15).

The court below erred and its decision should be reversed because it has "departed from the accepted and usual course of judicial proceedings" (Sup. Ct. Rule 19) in that: (1) In conflict with Rule 52(a), decisions of this Court, its own decisions and decisions of other Courts of Appeals, the majority below has arbitrarily rejected the right of the trial court to make findings of fact on conflicting evidence and has summarily substituted its own appellate fact findings for those of the trial court; and (2) it has interpreted the Illinois Saving Statute in conflict with applicable Illinois decisions and with decisions under similar statutes in other states.

REASONS FOR GRANTING WRIT

(1) The majority of the Court of Appeals erred and departed from the prescribed standards of judicial review by arbitrarily negating the inherent right of the District Court to disregard testimony that it found to be untrustworthy. In addition, the majority erred in summarily substituting its own factual findings for those of the District Court by adopting, as true, testimony and evidence rejected by the District Court as "untrustworthy," or "confused" or "uncertain," or based upon plaintiff's "reason to deceive others as to his birthplace."

The majority below resolved the "fundamental question" (B-15) by reaching what it found to be an "inescapable conclusion that plaintiff could have justifiably believed that he was born in England in 1892" (B-18). This conclusion was reached despite Judge Decker's specific findings that (A-10):

> "* * * *the plaintiff is a 'wholly untrustworthy witness.'* His claim that he was in good faith in 1959 in believing that he was born in Hull, England, has been repeatedly impeached. A portion of this impeachment comes from the evidence supplied by members of plaintiff's own family. *On the basis of the complete record, I find that the plaintiff did not honestly believe that he was born in Hull, England, when he asserted this fact in 1959. I further find that the plaintiff was not acting in good faith when he filed the 1959 proceeding* * * *."

Under the requirements of Rule 52(a), those findings by the trial court cannot be set aside unless they are clearly erroneous. As this Court said in *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 495-496 (1950):

> "But we cannot say that the District Court was 'clearly erroneous' in finding that the National Association and Nelson were not laced into the conspiracy to fix the commissions in the District of Columbia. * * *
>
> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent [Citing cases]. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

In *Remington Rand Inc.* v. *Societe Internationale Pour Participations Industrielles et Commerciales S. A.*, 188 F.2d 1011, 1013 (D. C. Cir. 1951), the District of Columbia court aptly stated that:

> "It is beside the point that a reviewing court might draw opposite inferences favorable to the contentions of [plaintiff]. That alone would not justify reversal of the present findings [Citing cases]. Where a trial involves disputed factual issues a choice must always be made between opposing versions of the evidence. In this case the law imposed that high duty and responsibility upon the presiding judge. His preferred opportunity for just appraisement of the witnesses and fair comparison and evaluation of the evidence is recognized in the law's command that 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' Fed. R. Civ. P. 52(a)."[6]

It is clear that in this case the trial court's finding that Factor "did not honestly believe that he was born in Hull, England, when he asserted this fact in 1959" could not be set aside by the court below "unless clearly erroneous." There is, and there can be, no question that this finding was based upon extensive and substantial evidence. Here, Judge Schnackenberg arbitarily departed from the correct rule announced by him in *A. L. B. Theatre Corp.* v. *Loew's Inc.*, 355 F.2d 495, 499 (7th Cir. 1966), that "We are not at liberty to disturb the trial court's choice between opposed, permissible inferences whenever from the evidence conflicting inferences may be drawn." Here as in *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F.2d 891, 894 (7th Cir. 1941), "It matters not that we might have arrived at a conclusion at variance with that of the trial court."

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6. In *Metalexport Co.* v. *Gen-O-Ral Processing Corp.*, 365 F.2d 178, 180 (7th Cir. 1966) Judge Schnackenberg, who wrote the majority opinion in the present case, was joined by Judge Swygert, the other member of the majority here, in correctly stating the rule that " • • • this court will not disturb the findings of the district court unless they are manifestly against the weight of the evidence."

Here, as in *Remington Rand,* "It is beside the point that [the court below] might draw opposite inferences favorable to the contentions of [plaintiff]."

It clearly was the duty of the court below "to refrain from attempting to substitute its findings for those of the trial court" (*Gary Theatre* at 894).

Completely disregarding this duty, the majority below summarily substituted its own factual findings for those of the District Court and adopted, as true, testimony and evidence specifically rejected by the District Court as "untrustworthy," "confused" or "uncertain," or based upon Factor's "reason to deceive others as to his birthplace." In doing so, the majority relied upon the following (B-4—B-9):

—The oral testimony of Factor.

—Various affidavits executed in 1932 or earlier.

—The deposition testimony of Factor's sister, Dena Lupu.

—The testimony of Factor's former lawyer, George Gilbert.

—The testimony of Factor's nephews and his son.

That Factor's evidence relied upon by the majority below was discredited upon cross-examination and affirmatively disproved by Petitioners' evidence is demonstrated by the record. What must be considered here are the District Court's findings, based upon such evidence, which were summarily upset by the Court of Appeals.

As to the testimony of Factor, Judge Decker has had the opportunity to assess Factor's credibility on two occasions and on each occasion has concluded that Factor, because of "frequent and repeated impeachment," is "impossible to believe" (A-6, A-10). As Judge Decker also noted, "Factor readily admitted that he made misstatements of facts in [Petititoner's Exhibits] to suit his convenience at the vari-

ous times that the statements were made" (A-9). Accordingly, the District Court properly could, as it did, refuse to believe Factor's testimony and the majority below should not have summarily overturned the finding of the trial court.[7]

The same affidavits introduced in this case by Factor were used by him in the 1931 case of *Faber, et al.* v. *Foreman Trust and Savings Bank, et al.*, No. 10538 (N.D. Ill. 1931) ("Faber Case").[8] The Faber Case involved Factor's first unsuccessful attempt in a Federal court to prove British citizenship (A-7). The District Court in the Faber Case rejected these affidavits in 1932 on the ground that Factor had *"an overwhelming motive"* in that case to deceive others as to the location of his birthplace (R. 23, 278). Similarly, Judge Decker, in considering those same affidavits in the present case found that (A-8):

> "All of the documents introduced by Factor were executed after Factor had a reason to deceive others as to his birthplace—namely, his need to protect a fraudulently obtained British passport—and eight of those documents were executed after plaintiff had a second reason to deceive—namely, his assertion of British citizenship in the *Faber* case."

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7. See *Adair* v. *Shallenberger*, 119 F.2d 1017, 1019 (7th Cir. 1941):

"It seems obvious that, having observed them [two witnesses] upon the witness stand, and having concluded that they had testified falsely in certain material respects, it [the District Court] relied upon the rule that a witness once impeached by incontrovertible evidence may be disbelieved in the entirety of his testimony. In such situation courts of review will not interfere with the finding of the trial court, who had full opportunity to observe the witnesses and all surrounding circumstances affecting their credibility."

8. See A-7—A-9.

Nevertheless, despite the rejection, by a District Court in 1932 and again by Judge Decker in this case, of affidavits presented by Factor, the majority below accepted them as true.

Moreover, Judge Decker found that the affirmative evidence of Petitioners was far more persuasive (A-9):

> "In contrast, *several of the defendants' exhibits were executed prior to 1918*—namely Factor's Illinois Marriage License Application, Factor's Illinois Barber's License Application, Jerome Factor's Birth Certificate, Factor's Declaration of Intention to become a United States citizen, Factor's draft card, and the manifest of the S. S. Haverford—*at a time when Factor had no reason to deceive. All of those documents show that Factor's birthplace was stated as Russia or Poland,* which was then under Russian domination."

Judge Decker also could and properly did disregard the deposition testimony of plaintiff's sister, Dena Lupu, as being "confused and uncertain testimony" to which the trial court could "give little, if any, credence" (A-8).

The testimony of Factor's former lawyer, George Gilbert,[9] in this case consisted merely of repeating what Factor and various members of Factor's family told Gilbert in 1928 and 1932, and of identifying the affidavits prepared for use in the Faber Case. Factor's assertions to Gilbert properly were disregarded by Judge Decker. Since the affidavits identified by Gilbert merely incorporate the alleged substance of what Factor's relatives told Gilbert orally, and since the District Court could and did properly characterize these affidavits as "self-serving" (A-8), Gilbert's testimony was of no significance.

Similarly, the testimony of Factor's nephews and son all related to events occurring in 1924, or thereafter (Fac-

9. See A-7.

tor having obtained his fraudulent passport in 1923),[10] at times when the witnesses were children, and such testimony merely repeated statements allegedly made by various of Factor's relatives more than forty years prior to the hearing in this case.

As the Seventh Circuit said in *Sun Life Assurance Co. of Canada* v. *Stacks*, 187 F.2d 17, 20 (7th Cir. 1951):

> "The trial judge has the function of finding the facts, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which he considers most reasonable, and *he has the inherent right to disregard the testimony of any witness when he is satisfied that the witness is not telling the truth or her testimony is inherently improbable due to its inaccuracy, uncertainty, or interest or bias.*"

In the face of the express requirement of Rule 52(a) and of overwhelming authority in this Court, in the Seventh Circuit and elsewhere that (a) findings of fact shall not be set aside unless clearly erroneous, and that (b) the trial judge has the function of finding the facts, weighing the evidence and choosing from among conflicting factual inferences and conclusions those which he considers most reasonable, the majority below usurped Judge Decker's function and summarily substituted its own findings of fact for those of the trial court.

(2) The majority opinion also holds that the District Court erred in allegedly imposing on Factor "the burden of *disproving defendants' charges of bad faith*" (B-4; emphasis by the court). Even if this holding were correct—which it is not—[11] the majority of the Court of Appeals

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10. See A-5, A-8.

11. In fact, the only burden imposed upon Factor was that he "go forward" first with his evidence on his own motion to vacate the District Court's prior judgment order of dismissal (R. 30) in

erred in substituting its own findings of fact for those of the District Court. Since the majority found that Judge Decker had misallocated the burden of proof, it should have remanded the case to the District Court with instructions to evaluate the evidence in accordance with the burden of proof as the majority found it.

(3) The majority of the Court of Appeals erred in holding that the Illinois Limitations Saving Statute (Ill. Rev. Stat., 1965, Chap. 83, Sec. 24a) does not require that a plaintiff seeking its benefits have made his prior jurisdictional allegations honestly or in good faith. Such an interpretation conflicts with the statutory purpose and with Illinois Supreme and Appellate Court decisions. The rejection of the "good faith" test by the majority below places the Seventh Circuit on record as the only court to reject the requirement in the thirty-one states having Saving Statutes similar to Section 24a.[12]

The "good faith" test appears to have been first suggested by this Court in 1883 in construing a Tennessee statute similar to that in issue here. In *Smith* v. *McNeal*, 109 U.S. 426, 430 (1883) this Court said:

> "Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bring-

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which motion plaintiff had requested the opportunity to "present evidence in support of his good faith belief" of English citizenship (R. 15). Furthermore, under Illinois law, Factor, as one seeking the benefit of an exception to the Statute of Limitations, had the burden of proof. See *O'Hara* v. *Carrillo*, 20 Ill. App. 2d 304, 155 N.E. 2d 850 (1st Dist. 1959).

12. In addition to Illinois, the courts of Arkansas, Kansas, Kentucky, Massachusetts, Missouri, Montana, New York, Oklahoma, Tennessee and Virginia have construed the saving statutes in those states as requiring "good faith." See *Annot.*, 6 ALR 3d 1043, 1045 (1966).

> ing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace."

Contrary to the majority below, the Illinois courts do not find the "good faith" requirement, established in Illinois in *Sachs* v. *Ohio Nat. Life Ins. Co.*, 131 F.2d 134, 137 (7th Cir. 1942), to be mere *"obiter dictum"* or to be an "additional requirement" that must be rejected. Instead, it repeatedly has been included in Illinois state court decisions construing the Saving Statute. See *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 203 N.E. 2d 415 (1964) (citing with approval the *"obiter dictum"* in *Sachs*); *Tidwell* v. *Smith*, 57 Ill. App. 2d 271, 205 N.E. 2d 484 (2d Dist. 1965); *Swiontek* v. *Greenstein*, 33 Ill. App. 2d 355, 179 N.E. 2d 427 (2d Dist. 1961); *Lundstrom* v. *Winnebago Newspapers, Inc.*, 32 Ill. App. 2d 266, 177 N.E. 2d 263 (2d Dist. 1961).

The Appellate Court of Illinois, for example, did not reject, as an "additional requirement," the obligation that a plaintiff seeking the benefits of the Saving Statute may not be guilty of self-initiated delay. *Tidwell* v. *Smith*, 57 Ill. App. 2d 271, 205 N.E. 2d 484 (2d Dist. 1965). There, the Appellate Court affirmed the dismissal of the re-filed complaint of a plaintiff who, like Factor, came within the *letter* of the Saving Statute, and said (57 Ill. App. at 273-274, 205 N.E. 2d at 486):

> "Plaintiff urges that the trial court erred in dismissing his complaint filed pursuant to section 24. *We believe that plaintiff comes within the letter, but not within the spirit and intent of this section.* It is a remedial section which seeks to protect a plaintiff, who *brings an action in good faith*, from complete loss of relief on the merits because of a procedural defect."
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> • • •

"The spirit of a statute will control over the letter of the enactment where there is a conflict."

In *Lundstrom* v. *Winnebago Newspapers, Inc.*, 32 Ill. App. 2d 266, 177 N.E. 2d 263 (2d Dist. 1961),[13] the Illinois Appellate Court was faced squarely with the "good faith" requirement in considering defendant's contention that plaintiff had made a jurisdictional allegation in bad faith. In that case, plaintiff's first libel suit was brought in Federal District Court as a diversity action between himself as a citizen of Illinois and the defendant newspaper as a Delaware corporation. The District Court "dismissed the complaint because defendant has its principal place of business in Illinois and there is no diversity of citizenship." After the Statute of Limitations had run, plaintiff sued in state court. In support of its motion to dismiss, defendant argued "that the relief provisions of the Limitations Act are not available to a party who does not act in good faith." In considering this position, the Appellate Court stated:

> "Defendant's counsel argues that since plaintiff knew that defendant published a newspaper at Rockford, he must have known that its principal place of business was there, and therefore his action in the Federal court was not commenced in good faith.
>
> • • •
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> *"It does not necessarily follow* that defendant's principal place of business was in Rockford because it published a newspaper there, or *that plaintiff did not act in good faith when he sued defendant in the Federal court under this mistaken belief that there was diversity of citizenship."*

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13. *Lundstrom* is reported as an abstract opinion only. The full text of the opinion is found in Appendix E hereto and is part of the record below.

The Illinois Appellate Court did not reject the "good faith" test as *"obiter dictum;"* rather, the court applied the test and found that Lundstrom had met it. Although *Lundstrom* was discussed at some length in defendants' brief filed with the Seventh Circuit (pp. 19-20), the majority below ignored *Lundstrom* and stated (B-12—B-13): "We have been cited to no decision of any federal court or of any Illinois court which has superimposed this [good faith] burden upon one who seeks to take advantage of § 24(a)." Obviously, *Tidwell* and *Lundstrom* are controlling in the court below and in this Court. *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938); *Wells* v. *Simonds Abrasive Co.,* 345 U.S. 514 (1953).

The majority below also ignored the case of *Hardin* v. *Cass County,* 42 Fed. 652 (C.C. W.D. Mo. 1890), which dealt with the effect of fraudulent jurisdictional allegations in connection with a plaintiff's effort to obtain the benefits of a Saving Statute similar to Section 24a. In that case, the court stated (42 Fed. at 654-655):

> "No impartial eye can read any of the decisions in question without discovering that the existence of good faith on the part of the actor in the first action instituted is the basis of the 'equitable construction' given the [Saving] Statute.
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> * * *
>
> "The statute in question, as all the courts say, should be equitably construed, as its purpose is to protect *honest* suitors. As it is designed to accomplish the ends of justice, *ex aequo et bono,* it is to be presumed that, whenever and wherever it should be made to appear to the court administering the statute that there was no mistake of fact, no misapprehension of law in the mind of the actor in first selecting his remedy or the forum, but that he took the course he did knowingly to evade the law and obtain an unauthorized judgment, the court would say to such a suitor: You are not within

the equity of the statute. *It was designed to promote justice, and not to aid fraud on jurisdiction.*"

In *Hardin,* plaintiff sued upon four bonds, two of which he knew did not exist. The total amount of the two bonds which did exist was insufficient to satisfy the minimum Federal jurisdictional requirement. The court observed (42 Fed. at 656): *"In the case at bar there was not only an 'inherent want of jurisdiction in the court in which it [the suit] was brought,' but the plaintiff knew it, and sought to evade the admission of the legal fact on the face of his petition by declaring on two other bonds he did not have, and which were not in existence."* The court then concluded (42 Fed. at 656-657):

> "It certainly is in the legitimate line of carrying out the spirit of both statutes under consideration [the Saving Statute and a Federal jurisdiction statute] to leave where he has voluntarily placed himself the suitor who has sought to misuse, and abuse the jurisdiction of this court to obtain its aid in the collection of a claim not cognizable by it. With full knowledge of his rights, the plaintiff saw fit to let the statute of limitations run against his demand while he was juggling with the court and the defendant; and he ought not to expect the same court to invoke the spirit of 'equitable construction' to release him from the trap he sprung on himself. * * * I feel constrained, therefore, to hold that the statute of limitation has also run against the cause of action stated in the third count of the petition."

Despite the fact that the majority below is prepared now to cast aside as *"obiter dictum"* a twenty-six year old "good faith" requirement in the Illinois Saving Statute, that requirement nevertheless has been applied and repeatedly approved by the Supreme and Appellate Courts of Illinois.

To discard the "good faith" test not only refuses to follow Illinois judicial authority but also means that the Sav-

ing Statute does and will protect dishonest and fraudulent, as well as honest, plaintiffs. Is it appropriate to preclude from the benefits of the Saving Statute a plaintiff who is guilty merely of delay, as in *Tidwell*, while at the same time granting those benefits to one, such as Factor, who has been found by a trial court to have been guilty of perpetrating a fraud in an effort to create a basis for Federal jurisdiction? If so, delay has become a more serious infraction of legal requirements than perjury. If Factor dishonestly attempted, as Judge Decker found that he did, to invoke Federal jurisdiction in his 1959 Case, the refusal of the majority below to apply the "good faith" requirement has the effect of stamping judicial approval upon Factor's attempted fraud.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD P. ROBINSON
GEORGE W. MCBURNEY
ARTHUR F. STAUBITZ
Attorneys for Petitioner,
Carson Pirie Scott & Company

NARCISSE A. BROWN
WILLIAM F. MCNALLY
Attorneys for Petitioner,
The Fair

Of Counsel:
SIDLEY & AUSTIN

MRS. ELOISE JOHNSTONE
Attorney for Petitioner,
Ray Brennan

JACK EDWARD DWORK
Attorney for Petitioner,
Kroch's & Brentano's, Inc.

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